

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
1998 Biennial Regulatory Review – Streamlined)	CC Docket No. 98-171
Contributor Reporting Requirements Associated)	
With Administration of Telecommunications)	
Relay Service, North American Numbering Plan,)	
Local Number Portability, and Universal Service)	
Support Mechanisms)	
)	
Telecommunications Services for Individuals)	CC Docket No. 90-571
With hearing and Speech Disabilities, and the)	
Americans with Disabilities Act of 1990)	
)	
Administration of the North American)	CC Docket No. 92-237
Numbering Plan and North American)	NSD File No. L-00-72
Numbering Plan Cost Recovery Contribution)	
Factor and Fund Size)	
)	
Number Resource Optimization)	CC Docket No. 99-200
)	
Telephone Number Portability)	CC Docket No. 95-116
)	
Truth-in-Billing and Billing Format)	CC Docket No. 98-170

**VERIZON WIRELESS REPLY COMMENTS ON SECOND FURTHER NOTICE
OF PROPOSED RULEMAKING AND COMMENTS ON USF STAFF STUDY**

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SUMMARY

The fundamental flaws with earlier proposals in the universal service fund (“USF”) contribution proceeding afflict all of the new connection-based allocation proposals. To pass muster under Section 254, the USF contribution system must be equitable and non-discriminatory, and have a clear nexus to interstate activity levels. The three connections-based proxies under consideration in the *Second Further Notice* fail these requirements. They do not correlate with interstate activity, both over-assessing and under-assessing USF contributions for competing classes of carriers, and discriminating against wireless carriers and their customers.

This proceeding began with exaggerated claims regarding the stability and sufficiency of the USF. Even accepting these claims, the Commission recently adopted significant changes to the revenue-based system that reduced the contribution obligations of IXC and responded to a number of IXC concerns. There is strong record support for retaining the revenue-based system and giving the new rules a chance to work. Verizon Wireless urges the Commission instead to scrutinize the rapid growth of the USF to ensure that the USF collects only those funds required to meet demonstrated need.

The Staff Study confirms two important conclusions that Verizon Wireless has drawn in previous comments: (1) the USF is not in a “death spiral” and the revenue-based system can continue to provide a reliable and sustainable USF; and (2) the connections-based proposals shift substantially higher contribution percentages to wireless carriers while substantially lowering the contribution percentages of IXCs – without justification – and in violation of Section 254(d).

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Verizon Wireless hereby submits its reply comments in response to the *Second Further Notice* in the Commission’s proceeding on universal service contribution methodologies.¹ These comments also include Verizon Wireless’ initial comments in

¹ Federal-State Joint Board on Universal Service, *Report and Order and Second Further Notice of Proposed Rulemaking*, CC Docket No. 96-45, (released December 13, 2002) (“*Second Further Notice or Report and Order and Second Further Notice*”) at ¶ 69.

response to the Commission's Public Notice on a Staff Study comparing alternative methodologies for calculating contributions to the federal universal service fund ("USF") support mechanisms.²

Both the initial comments and the Staff Study confirm what Verizon Wireless and others have stressed to the Commission: it should stay the course with the current revenue-based system. In contrast, illegal, discriminatory, and patently inequitable results would flow from adopting any of the connections-based proposals under consideration.³ In light of the record and the details presented in the Staff Study, Verizon Wireless continues to believe that using methods for calculating USF payments that are not tied to interstate activity will artificially and disproportionately increase contributions by certain industry segments, namely wireless carriers, enabling IXC's to avoid their fair contribution obligation.⁴ Rather than turning a lawful system into an unlawful one, the FCC should instead focus on the real problem, the runaway growth of the fund.

The terms "equitable" and "nondiscriminatory" are critical to the FCC's interpretation and implementation of universal service pursuant to Section 254(d) and should be defined more clearly by the Commission and then adhered to in the final determination of a contribution mechanism.⁵ The Court of Appeals for the Fifth Circuit stated that the equitable language in Section 254 refers to the "fairness in the allocation of

² *Commission Seeks Comment on Staff Study Regarding Alternative Contribution Methodologies*, Public Notice, FCC 03-31, (rel. Feb. 25, 2003) ("Staff Study").

³ See Comments by Verizon Wireless at ii, 2-4, 7-21; See also Comments by Nextel at 6.

⁴ Comments by Verizon Wireless at ii, 22.

⁵ See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd. 8776, 8801, ¶ 47 (1997), ("First Report and Order"), aff'd in part, rev'd in part, remanded in part sub nom. *Texas Office of the Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("TOPUC").

contribution duties.”⁶ The closest the FCC has come to defining these terms is embodied in its adoption and definition of the principle of competitive neutrality, as urged by the Joint Board.⁷ While the principle of competitive neutrality is important (and is discussed herein in Section IB), the FCC must also define the key terms in the USF authorizing statute and state how the proposed contribution methodologies meet each defined component of the rule.

Verizon Wireless commends the Commission for releasing the Staff Study, which provides a useful discussion document to facilitate comparison of the approaches outlined in the *Second Further Notice*.⁸ Verizon Wireless has some concerns regarding the growth rates ascribed to wireless carriers, particularly paging carriers, and is continuing to analyze and review the Staff Study.⁹ Overall, the Staff Study is a necessary tool and, to the extent its assumptions are valid, provides the basis for an “apples to apples” comparison of the various proposals.

⁶ TOPUC at 434. The TOPUC Court also noted that while the FCC can fall back on its discretion under the statute to balance competing concerns (which included the need for sufficient revenues to support the USF), that discretion is not absolute. The heavy inequity placed on certain carriers in that case was not excused as a consequence of the FCC’s administrative discretion. *Id.*

⁷ See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd. at 8801, ¶ 47.

⁸ Staff Study at 10.

⁹ For example, the study states that conservative growth assumptions were chosen, which drive revenue, connection and telephone number projections. The Staff Study assumes, conservatively, that mobile wireless lines will grow by 11 percent this year and then decline, reaching 192 million units in early 2008. Despite the decline in paging, the Staff Study projects that the number of two-way pagers will increase from about 1 million units today to 4 million units in 2007. Staff Study at 13-14. Verizon Wireless is skeptical of these growth projections, but will reserve judgment on them as it continues to evaluate the Staff Study along with the comments that are being filed.

I. MANY COMMENTORS SUPPORT THE REVENUE-BASED APPROACH, OPPOSE CONNECTION-BASED ASSESSMENTS AND URGE THE FCC TO CLOSELY MONITOR THE RUNAWAY GROWTH OF USF

A diverse array of commentors on the *Second Further Notice* question the need for an overhaul of the revenue-based system, as well as the legality and appropriateness of the various connection-based schemes.¹⁰ Despite significant comments to the initial *Notice*¹¹ and the *Further Notice*,¹² the Commission released the *Second Further Notice*, largely disregarding salient opposition to connections-based proposals from the two earlier rounds of this proceeding.¹³ The FCC has a legal obligation to take these comments seriously and address the legitimate challenges to the FCC's proposals raised therein.¹⁴

¹⁰ Comments by American Association of People with Disabilities ("AAPD") at 1; National Association for the Deaf ("NAD") at 1; Community Action Partnership/Latino Issues Forum ("CAP/LIF") at 2; Consumers Union, Texas Office of Public Utility Counsel, Consumer Federation of America, Appalachian People's Action Coalition, Center for Digital Democracy, Edgemont Neighborhood Coalition, and Migrant Legal Action Program ("CU et al.") at iii; Telecommunications Research and Action Center ("TRAC") at 1-2; Rainbow/PUSH Coalition ("PUSH") at 1-2.

¹¹ Federal-State Joint Board on Universal Service, *Notice of Proposed Rulemaking*, 16 FCC Rcd. 9892 (2001) ("*Notice*").

¹² Federal-State Joint Board on Universal Service, *Further Notice of Proposed Rulemaking and Report and Order*, 17 FCC Rcd. 3752 (2002) ("*Further Notice*").

¹³ Verizon Wireless and others provided "significant comments" on the *Notice and the Further Notice*, which are defined as comments that "raise[s] points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule." See *HBO v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977); *COMSAT v. FCC*, 836 F.2d 623, 634 (D.C. Cir. 1988); See Comments and Reply Comments by Verizon Wireless, CC Docket No. 96-45, filed April 22, 2001 and May 13, 2002. See *Ex Parte Letter*, Stephen J. Berman to Magalie Roman Salas, dated October 24, 2001 (regarding a meeting opposing per-line assessment proposals and attended by representatives from Verizon Wireless, Cingular and CTIA); *Ex Parte Letter*, Dustun L. Ashton to Magalie Roman Salas, dated November 15, 2001 (regarding a meeting attended by representatives from CTIA, Cingular, Alltel, VoiceStream, Verizon Wireless, and Wilkinson Barker Knauer).

¹⁴ See *Chrysler Corp. v. Brown*, 441 U.S. 281, 312 (1979); *Alabama Power v. Costle*, 636 F.2d 323, 384 (D.C. Cir. 1979).

A. The Rapid Growth of the USF Must Be Scrutinized

Several commentators noted that while the goals of universal service are laudable, there are legitimate reasons to be concerned about the seemingly unchecked growth of the USF.¹⁵ The so-called “death spiral” of USF is a misperception based on the climbing costs of the USF fund relative to the growth of telecommunications revenues.

As an initial matter, Verizon Wireless does not accept that the USF is in dire straits. As NASUCA has pointed out, despite all the talk of a USF death spiral, the statistics reveal that “the patient is nowhere near critical condition.”¹⁶ Nevertheless, Verizon Wireless does agree that the FCC should be vigilant in ensuring that the size of the fund does not grow unnecessarily.

For example, the potential for fraud associated with the second largest portion of the fund, the Schools and Libraries program, is disturbing.¹⁷ NASUCA aptly states, “One way ‘to ensure the long term stability and sufficiency of the universal service support system’ is to ensure that grants under the schools and libraries program are no more than necessary under the 1996 Act.”¹⁸ Commissioner Abernathy recently provided a written statement to the Senate Subcommittee on Communications regarding the FCC’s plans to

¹⁵ Comments by Association for Communications Technology Professionals in Higher Education (“ACUTA”) at 3, by National Association of State Public Utility Consumer Advocates (“NASUCA”) at 12, 15.

¹⁶ Comments by NASUCA at 13-14. The Staff Study confirms this fact because it shows that under the revenue-based system there is a projected *increase* in the contribution base from \$76.4 billion in 2002 to \$80.1 billion in 2003. The contribution base remains constant until the 2006-2007 timeframe, when the projected decline is only back down to 76.7 billion, which is higher than the base in 2002. Staff Study at 5.

¹⁷ Comments by NASUCA at 15 (citing Office of the Inspector General, Semi-Annual Report (October 31, 2002) at 2-10).

¹⁸ *Id.* (quoting *Second Further Notice* at ¶ 14).

address waste, fraud, and abuse, where necessary, as part of its ongoing oversight of the schools and libraries program.¹⁹ The FCC should intensify its investigations now.

In addition, the Commission should consider the significant growth in the fund attributable to increased payments to rural ILECs. Such payments have grown 71 percent over the last 18 months, from a projection of \$1.93 billion to \$3.3 billion.²⁰ Because this fund growth has been matched by reductions in access charges paid by IXC, the Commission should be particularly skeptical of IXC claims that declining end-user interstate revenues affect their ability to meet their universal service obligations. Managing the demand for USF is an important way to ensure the ongoing sufficiency of contributions. The focus thus far on increasing carriers' contributions to the fund and shifting contribution obligations between different carrier classes masks the importance of managing fund levels commensurate with demonstrated need.

B. The Record Supports Retaining the Competitively Neutral Revenue-Based System

In a strong show of support for the newly modified revenue-based system, a wide range of commentors urged the Commission to allow the new measures to take hold and succeed before totally overhauling the USF contribution methodology.²¹ For example, CTIA asserts that the recent modifications of the revenue-based system corrected many of the problems that spurred certain parties to seek a connections-based system.²² Fred

¹⁹ Written Statement of Kathleen Q. Abernathy, Commissioner, FCC, "Preserving and Advancing Universal Service," before the U.S. Senate Committee on Commerce, Science, and Transportation Subcommittee on Communications, April 2, 2003.

²⁰ USAC Quarterly Reports for 6 quarters through 2Q2003.

²¹ Comments by CU et al. at iii, 3-4; CTIA at 2-3; Fred Williamson and Associates ("FW&A") at 4; J2 Global at 4-5; MetroCall at 4-8; Montana Independent Telecommunications Systems ("MITS") at 3; Nextel at i, 21-23; Verizon Wireless at ii; National Telecommunications Cooperative Association ("NTCA"); PUSH at 2; TracFone at 5-10; WebLink Wireless at 8-10.

²² Comments by CTIA at 3; *See also* Comments by Virgin Mobile ("VMU") at 4-5.

Williamson and Associates (“FW&A”), representing several small ILECs,²³ noted that the bundling of services by wireline carriers should not impose any problems for determining interstate revenues either because service bundles typically include services that are separable (but are just bundled and offered as a discount to consumers), or if not separable, an interstate minutes of use (“MOU”) percentage (or other proxy) could be used to determine interstate revenues.²⁴

Consumers Union, Texas Office of Public Utility Counsel, Consumer Federation of America, Appalachian People’s Action Coalition, Center for Digital Democracy, Edgemont Neighborhood Coalition, and Migrant Legal Action Program (“CU et al.”), all believe that the new measures will likely be sufficient to ensure the long-term stability of the USF, and consequently, the Commission should not consider overhauling the USF assessment system until the recent changes are given a chance to succeed.²⁵ NTCA urges the Commission to refrain from further changes to the USF contribution system until implementation of final rules in the universal service redefinition and portability proceedings. Further, NTCA urges the FCC to resolve the issues regarding the classification of broadband internet services to expand the base of contributors and further ensure the success and long-term viability of the USF.²⁶

Moreover, the record demonstrates resoundingly that connections-based proposals are in many ways inferior to the existing revenue-based system. The Allied National

²³ FW&A represents several Oklahoma and Kansas ILECS: Chouteau Telephone, H&B Telephone, Moundridge Telephone, Pine Telephone, Pioneer Telephone Assn., Totah Telephone, and Twin Valley Telephone.

²⁴ Comments by FW&A at 6-7.

²⁵ See Comments by CU et al. at iii; See also NTCA at 2.

²⁶ See Comments by NTCA at 3. See also Comments by TracFone at 10. The Staff Study assumes status quo treatment of broadband services and therefore does not reflect the full impact

Paging Association (“Allied Paging”) best expressed the skepticism regarding the connections-based proposals: “Connection-based assessments are merely (inadequate) proxies for the existing revenue-based model. At best, they replace a well-established, competitively neutral, assessment model with a new program that is rife with uncertainty, difficult to verify, subject to legal challenges, costly to implement and far more difficult to administer than the current revenue-based model.”²⁷ Moreover, as Nextel points out, “[t]here is no reason to think that connections-based proxies are superior to usage sensitive forms of cost recovery from the vantage of economic efficiency.”²⁸

The record demonstrates that many commentators still support retaining the revenue-based method²⁹ because it is: (1) reliable, verifiable, and competitively neutral;³⁰ (2) easier to explain to customers;³¹ (3) a method with which the FCC has ample experience;³² (4) flexible, adjustable, and easier to administer;³³ and (5) avoids inappropriate cost shifting that is illegal under Section 254, thereby avoiding legal challenges.³⁴

Among these strong reasons for retaining the revenue-based system, perhaps the most important concern is ensuring competitive neutrality in USF support obligations. The FCC acknowledged the importance of competitive neutrality when it stated,

that that inclusion or exclusion of any or all broadband services would have on the contribution levels. Staff Study at 6-8.

²⁷ Comments by Allied Paging at 4.

²⁸ Comments by Nextel at 4-5,

²⁹ *But see* Comments by Qwest at 2 (“most parties now agree that some form of connection-based methodology is necessary”).

³⁰ Comments by Allied Paging at 5, 12; Arch Wireless (“Arch”) at 4; Beacon at 1; MITS at 5.

³¹ Comments by Allied Paging at 5.

³² Comments by American Public Communications Council (“APCC”) at 25.

³³ Comments by Arch at 4-5; Concerned paging Carriers (“CPC”) at 5-6, 15-16.

³⁴ Comments by CU et al. at 18; APPC at 25.

“Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.”³⁵ After a detailed, comprehensive evaluation of alternative mechanisms, the FCC determined to assess contributions based on telecommunications revenues derived from end users for several reasons, including administrative ease and competitive neutrality.³⁶ The FCC determined, and the Fifth Circuit affirmed, that the revenue-based system is competitively neutral.³⁷

The concept of competitive neutrality reinforces and is consistent with the explicit requirement of Section 254 that contributions to USF must be equitable and nondiscriminatory.³⁸ The primary concern regarding the connections-based proposals of the *Second Further Notice* is that they unfairly advantage and favor IXC by shifting a disproportionate burden for supporting USF to wireless carriers and others.³⁹ Using the existing revenue-based contribution levels as a benchmark, it is clear that all of the connections-based proposals unfairly and impermissibly shift contribution obligations among industry sectors.⁴⁰

AT&T argues against retaining the revenue-based system, by claiming that the wireless safe harbor favors wireless carriers.⁴¹ Yet the FCC has modified the wireless

³⁵ See *First Report and Order* at ¶ 47.

³⁶ *Id.* at ¶ 844.

³⁷ *Id.* at ¶¶ 844-850; *TOPUC*, 183 F.3d 393.

³⁸ *Id.* at ¶ 48.

³⁹ Comments by Verizon Wireless at ii, 3, 11,13; CU et al.at 14,18; FW&A at 11; ITA at 5; MetroCall at 9.

⁴⁰ Comments by Verizon Wireless at 3.

⁴¹ Comments by AT&T at 21.

safe harbor to ensure the ongoing competitive neutrality of the revenue-based system, resulting in a substantial increase in the contributions of wireless carriers. In revising the safe harbor, the FCC adopted the highest figure from among a range of traffic study figures submitted by carriers.⁴² There is no basis whatsoever for AT&T to complain that wireless carriers are underpaying to the USF. The FCC can adjust the safe harbor going periodically forward, either upward or downward, as necessary given industry trends and traffic studies. Moreover, such methods can be used when the base of contributors is expanded to include emerging or bundled services with jurisdictionally mixed traffic.⁴³

The flexibility of the revenue-based system is one of its great advantages over the contribution-based proposals. Under this system, the FCC can adjust the safe harbor or other mechanisms of the system to changing market conditions and industry trends. In contrast, the connections-based proposals effectively exclude certain industry segments from meaningful contribution obligations by employing artificial units or proxies for determining contributions to the USF, such as connections (which translate into handsets for wireless providers) and telephone numbers. In contrast, every telecommunications carrier that provides interstate service for a fee has interstate telecommunications revenues that can be apportioned or approximated, and from which a USF contribution can be derived in a competitively neutral manner.

C. Existing Connections-Based Proposals are Discriminatory and Will Unnecessarily Harm the Paging Industry

⁴² *Report and Order and Second Further Notice* at ¶ 22.

⁴³ Comments by TracFone at 10-13.

Many paging carriers agree with Verizon Wireless that connections-based proposals are discriminatory and violate Section 254(d) of the Act.⁴⁴ Among the criticisms of the FCC's proposals were the following: (1) connections-based proposals are not competitively neutral;⁴⁵ (2) intrastate revenues are illegally assessed;⁴⁶ (3) IXC's are exempted from meaningful USF obligations;⁴⁷ (4) carriers with similar interstate calling volumes are assessed with different methods (some on a per-connection basis, some with minimum contribution obligations designed to account for the lack of the requisite connection) and as a result will have wildly disparate USF contribution obligations;⁴⁸ and (5) carriers with low volume users (like prepaid customers) will pay for the same number of connections as carriers with carriers with high volume users.

Allied Paging explains that the connections-based proposals are not competitively neutral because the unit of measurement bears no relationship to interstate revenues. Many paging providers are concerned that carriers that provide little interstate telecommunications service to their end users (small to mid-sized paging carriers) will nevertheless contribute disproportionately *vis-à-vis* carriers that provide substantial interstate service to end users (e.g., IXC's).⁴⁹ Paging carriers argue compellingly that the increasing regulatory burdens will increase their cost of doing business dangerously and further weaken a declining industry segment.⁵⁰ Arch Wireless states that the connections-based proposal will cause a disproportionately negative and harmful impact

⁴⁴ Comments by Verizon Wireless at 2-4; Allied Paging at 7; Arch at 5; CU et al. at 4-5; CPC at iii; Industrial Telecommunications Association ("ITA") at 5; MetroCall at 8.

⁴⁵ Allied Paging at 9.

⁴⁶ Allied Paging at 10.

⁴⁷ CU et al. at 14.

⁴⁸ *Id.*

⁴⁹ Comments by Allied Paging at 9; AAPC at 6; Arch at 10-11; CPC at 18.

⁵⁰ Comments by Allied Paging at 4, 14; AAPC at 7; Arch at 2-3, 7; CPC at 3, 13-15.

on messaging carriers as compared to other industry segments with whom they compete.⁵¹ According to Allied Paging, the paging industry cannot simply absorb (nor should it be required to absorb) the disproportionate obligations that flow from the connections-based proposals.⁵²

II. THE STAFF STUDY CONFIRMS THAT EXISTING CONNECTIONS-BASED PROPOSALS ILLEGALLY SHIFT A DISPROPORTIONATE BURDEN FOR SUPPORTING USE TO WIRELESS CARRIERS

The Staff Study illustrates the patent inequities in all of the per-connection proposals. Captured below are the Staff Study's projections of each industry segment's contribution share by 2007. Remarkably, in the per-connection scenarios (*e.g.*, Proposals 1, 2, 3) the contribution share from IXC's ranges from 13% to 22%, as compared to higher ranges of 20% to 55% for LECs and 31% to 43% for CMRS. The reduction in the proportionate contribution from the IXC's from 41% (under the revenue-based method) to as low as 13% (under Proposal 3) is achieved by shifting higher contribution percentages to other carriers.

Industry Segment	Revenue-Based Method	Connection-Based Proposal 1 ⁵³	Connection-Based Proposal 2 ⁵⁴	Connection-Based Proposal 3 ⁵⁵
IXC	41%	22%	29%	13%
LEC	32%	45%	20%	55%
CMRS	27%	31%	43%	31%

⁵¹ Comments by Arch at 3.

⁵² Comments by Allied Paging at 14.

⁵³ The Connections-Based Method with Mandatory Minimum Obligation is herein referred to as "Proposal 1."

⁵⁴ The SBC/BellSouth Proposal to Split Connections Between Switched Transport and Access Providers is herein referred to as "Proposal 2."

⁵⁵ The Telephone Number Proposal is herein referred to as "TN-based Proposal" or "Proposal 3."

In none of the proposed connections based proposals is the resulting reduction in IXCs' contribution obligation – and concomitant increase in wireless carriers' obligations – explained or justified. Adopting any of the connections-based proposals would exacerbate the already high USF burdens being borne by wireless carriers.

The fact remains that, under Section 254, all providers of interstate services must make contributions to USF on an equitable and nondiscriminatory basis.⁵⁶ Several commentors noted that IXCs are still the predominant providers of interstate services.⁵⁷ As well, many commentors noted that none of the connection-based proposals is tied to actual interstate activity, but instead to capacity or connections⁵⁸ – which does not justify the shifting of burdens in this manner. The Commission has not explained in the *Second Further Notice* how it defines equitable and nondiscriminatory, nor how the connections-based proposals meet this standard. The Commission must not only have a factual record to ensure that a decision is not arbitrary and capricious, but also must square the selected proposal with the requirements of the statute. The *Second Further Notice* fails on both counts.

The Commission recently increased the CMRS safe harbor for contributions to the federal universal service fund from 15 percent to 28.5 percent.⁵⁹ Of the range of reported interstate revenues based on carriers' traffic studies, the FCC adopted the top percentage in the range, making no allowances in the safe harbor for carriers with lower

⁵⁶ 47 U.S.C. § 254.

⁵⁷ Comments by FW&A at 10; NASUCA at 20; NRTA/OPASTCO at 6; Western Alliance at 12.

⁵⁸ Comments by Allied paging at 9; CU et al. at 4; MetroCall at 3-4; NASUCA at 18.

⁵⁹ *Report and Order and Second Further Notice* at ¶ 19.

levels of interstate traffic.⁶⁰ At the same time, state commissions are requiring wireless carriers to contribute into state universal service funds based on intrastate revenues, a system that also minimizes IXC contributions.⁶¹

III. SUPPORTERS DO NOT OFFER PERSUASIVE LEGAL ARGUMENTS FOR THE EXISTING CONNECTIONS-BASED PROPOSALS

Verizon Wireless and other commentors have challenged the connections-based proposals' failure to equitably assess IXCs despite the statute's requirement that all providers of interstate telecommunications contribute on a equitable and nondiscriminatory basis.⁶² Proponents of those proposals fail to show that they are superior to the current system or that they are even lawful.

A. Proponents' Legal Arguments Do Not Buttress Connections-Based Proposals

In attempting to reconcile connections-based mechanisms with the law, WorldCom and AT&T state that while Section 254(d) is to be read for its "plain meaning," commentors should not confuse plain meaning with "literalism."⁶³ WorldCom states, "The first sentence of Section 254(d) cannot be read literally to require that every telecommunications carrier contribute because the second sentence makes clear that carriers need not contribute if their contributions would be *de minimis*."⁶⁴ In the case cited by WorldCom and AT&T, *Bell Atlantic v. FCC*, the literal language of two sections

⁶⁰ Carriers can, however, seek a lower contribution percentage based on their actual levels of interstate traffic as derived from traffic studies. *Id.* at ¶ 22.

⁶¹ KAN. STAT. ANN. § 66-2008(b) (2002); 65-407 Code ME. R. § 288 (2003); TEX. UTIL. CODE ANN. § 56.022 (West 2001).

⁶² Comments by Allied at 8; CU et al. at 13-14; FW&A at 9; NASUCA at 20-21; Verizon Wireless at ii.

⁶³ Comments by World Com at 26; AT&T at 39-40, "The argument that Section 254(d) mandates a contribution from every single interstate carrier is likewise mistaken" and "confuses 'plain meaning' with literalism" (citing, *Bell Atlantic v. FCC*, 133 F3d. 1044, 1045 (D.C.Cir. 1997) ("*Bell Atlantic*").

of the same statutory provision, Sections 272(a)(2) and 272(e)(4), produced a potential contradiction sufficient to preclude the plain meaning asserted by the petitioners.⁶⁵ As the court stated, “At first blush, the second provision appears to give back what the first section takes away, *i.e.*, a BOC’s ability to provide interLATA origination services in a physically integrated network with its local exchange services.”⁶⁶

Against this backdrop, WorldCom asserts that the better reading of Section 254(d) is that the first sentence prescribes a process, not a payment result; that, as long as carriers contribute according to the formula established by the Commission’s rules, the dictates of Section 254(d) are met.⁶⁷ Consequently, if a carrier has no (or few) connections as defined by Proposal 1, which will result in no (or minimal) contribution assessment, the formula is nevertheless equitable and non-discriminatory.⁶⁸ Under this reading of Section 254(d), the discriminatory result of the formula would not appear to matter.

Verizon Wireless disagrees with this strained interpretation of Section 254(d) and the misapplication of *Bell Atlantic* to justify dramatically lowered IXC burdens (and concomitant shifting of that burden to other carriers), through the connections-based proposals. First, unlike the language at issue in *Bell Atlantic*, the literal language of Section 254(d) is entirely consistent and is not contradictory. Specifically, Section 254(d) states unequivocally that all providers of interstate telecommunications services shall contribute to the USF, and that the FCC may exempt providers that would otherwise make *de minimis* contributions. That Congress provided for one exemption – the *de*

⁶⁴ Comments by World Com at 29; *See also* Comments by AT&T at 40.

⁶⁵ *Bell Atlantic*, 133 F3d. 1044, 1048.

⁶⁶ *Id.* at 1045.

⁶⁷ Comments by World Com at 29; AT&T at 41.

minimis exemption – does not make its requirement that all telecommunications service providers contribute any less mandatory.⁶⁹

Indeed, Congress’s specification of the *de minimis* exemption to the requirement that “all” telecommunications providers contribute to USF precludes a methodology that exempts other classes of contributors. Because Congress specified the single circumstance under which the FCC may exempt carriers from the express requirement that they contribute, the FCC is not at liberty to craft additional exemptions.⁷⁰ And it is clear that the IXC’s do not fall within this single exception. The *de minimis* exemption only applies to “a carrier or class of carriers from this requirement *if the carrier’s telecommunications activities are limited* to such an extent that the level of such carrier’s contribution to the preservation and advancement of universal service would be *de minimis*.”⁷¹ The interstate activities of IXC’s are not so limited so as to support a claim for *de minimis* contributions. In fact, IXC’s continue to profit from the greatest proportion of interstate activity in the industry. Indeed, the problem with the connections-based proposals is that they do not properly measure or account for interstate activity, producing the anomalous results observed in the Staff Study.

Second, *Bell Atlantic* merely requires that the context of the statute must be considered to inform the literal language. With context to illuminate the usage, a textual analysis can be made of the statutory provision. Here, there is neither textual nor

⁶⁸ Comments by World Com at 29; AT&T at 42.

⁶⁹ See *Crockett Telephone Co. v. FCC*, 963 F.2d 1564, 1570 (D.C. Cir. 1992) (use of “may” and “shall” in the same section “argues for the usual construction of each word” and makes it “especially likely that Congress actually meant what it said”).

⁷⁰ *Railway Labor Executives Ass’n v. National Mediation Bd.*, 29 F.3d 655, 670-71 (D.C. Cir. 1994) (agencies only have authority specifically delegated by Congress, and “deference is warranted only when Congress has left a gap for the agency to fill”).

⁷¹ 47 U.S.C. § 254(d) (emphasis added).

contextual support for the notion that Congress meant to allow any party, including IXCs, to avoid contributions to the USF when their interstate activities are not truly limited.

Third, even if Section 254(d) describes a process, when it states that “every telecommunications carrier that provides interstate telecommunications services shall contribute,” it also mandates a result when it states in the same line, “on an equitable and nondiscriminatory basis.”⁷² If the result is that IXCs, whose core business is still the provision of interstate service to the public, avoid meaningful and proportionate contribution obligations to the USF despite their traffic, such a result is in no way equitable or nondiscriminatory *vis-a-vis* the other carriers that must then shoulder that burden. In that case, the formula or process itself is not lawful under Section 254(d). In this regard, Verizon Wireless agrees with VMU that regardless of the assessment method or formulation, the assessments must be equitable across industry segments.⁷³

B. The Connections-Based Method with Mandatory Minimum Obligation Is Unlawful

Verizon Wireless does not oppose unit-based proposals *per se*, as long as there is a reasonable and competitively neutral nexus to interstate activity.⁷⁴ Nextel, too, has stated that it is conceivable that some form of connection-based assessment could be a rational outcome.⁷⁵ However, Verizon Wireless agrees with the chorus of commentators stating that none of the three connections-based proposals presented in the *Second Further Notice* is adequate or lawful.⁷⁶ The Connections-Based Method with Minimum Mandatory Obligation (a/k/a, Proposal 1) requires a contribution of only a one percent of

⁷² 47 U.S.C. § 254(d).

⁷³ Comments by VMU at 3.

⁷⁴ Comments by Verizon Wireless at ii.

⁷⁵ Comments by Nextel at 7.

⁷⁶ *Id.*; Comments by Verizon Wireless at 10-13,18; NRTA/OPASTCO at 10.

annual interstate telecommunications revenues by IXC⁷⁷. Setting the mandatory minimum contribution amount at one percent does not meaningfully approximate the level of interstate activity of IXCs.

While Virgin Mobile (“VMU”) agrees that maintenance of the existing revenue-based system is the best alternative before the Commission, it supported a substantial modification to the mandatory minimum contribution aspect of Proposal 1.⁷⁸ VMU proposes that the mandatory “minimum contribution” be converted to an “equitable contribution” in which IXCs and other non-connections-based contributors would pay approximately the same percentage of the interstate revenues to the USF as carriers contributing on a per connection basis.⁷⁹ For example, the one percent minimum contribution might increase to seven percent (or greater) with VMU’s modification to make Proposal 1 more closely adhere to the statute.⁸⁰

VMU attempts to adapt Proposal 1 in a manner more consistent with Section 254(d). There may be other ways to tie the mandatory contribution to actual usage and thereby achieve a more equitable mandatory contribution. If the Commission continues down the per-unit or per-connection path, it will need to make substantial modifications to Proposal 1 in order to ensure equitable contributions from all telecommunications providers.

C. The Split Connections Proposal Is Unlawful

NRTA and OPASTCO assert that the only connections-based proposal that has the necessary nexus with Section 254(d)’s statutory prescription for carrier contributions

⁷⁷ *Second Further Notice* at ¶ 78.

⁷⁸ Comments by VMU at 5-13.

⁷⁹ *Id.* at 7-8.

⁸⁰ *Id.* at 9.

is the proposal to assess contributions on both transport and access providers (a/k/a, Proposal 2).⁸¹ While NRTA and OPASTCO correctly note that interstate communication requires both a connection to a local distribution network and a connection to a network that actually transports the communication across state lines,⁸² the assessment approach outlined in the *Second Further Notice* would unfairly result in wireless carriers (unlike other carriers) being assessed twice for every interstate call. As proof of the disproportionate burden that would be placed on wireless carriers, the Staff Study shows that wireless carriers would bear 43 percent of the USF burden in 2006 and 2007.⁸³ There is no empirical support for such a result – a result that is contradicted by evidence from CMRS traffic studies on the record that provide actual CMRS interstate telecommunications traffic volumes ranging from 12 to 28.5 percent. The Commission relied on that record evidence to establish the 28.5 percent safe harbor. NRTA and OPASTCO in any event concede that that this proposal is flawed because it would require the FCC to continue working to develop a workable and fair methodology based on splitting the connections-based assessments between transport and access providers.⁸⁴

SBC and BellSouth urged the FCC to adopt Proposal 2 as well. They argue that the capacity tiers attempt to approximate interstate activity based on the number and capacity of the connections provided by carriers. However, the Staff Study reveals that,

⁸¹ Comments by NRTA/OPASTCO at 5.

⁸² *Id.*

⁸³ Staff Study at 7. The Western Alliance (“Western”) supports Proposal 2 as the only one of the three options that complies with Section 254(d) because the other two would, “place the predominant contribution burden upon local exchange carriers and wireless carriers, while slashing the contribution burden of IXC’s” to low levels. Comments by Western at 27. By the same token, Proposal 2 does not comply with Section 254(d) because it too shifts the predominant contribution burden to wireless carriers.

⁸⁴ *Id.* at 7.

at least as formulated and modeled by the FCC, the capacity tiers fail in this objective because wireless carriers face a disproportionately high burden under Proposal 2. In effect, this proposal penalizes CMRS network configurations⁸⁵ by separating out for assessment the access and transport functionalities, which are meaningless to wireless customers.⁸⁶ Variations of this proposal presented in the *Second Further Notice* rely on revenue-based assessments to fill in the gaps created by the fact that not all providers of interstate services have network connections, calling into question why the Commission should not just preserve the modified revenue-based system.

D. Telephone Number Based Assessments Violate Section 254 and Exceed the Commission's Authority

The telephone number-based assessment (a/k/a, Proposal 3) is also inequitable and discriminatory, and reliance on section 251(e) does not remedy the jurisdictional problems with assessing local connections. Contrary to assertions by AT&T,⁸⁷ Section 251(e) provides no basis for raising USF funds by essentially taxing carriers for their legitimate use of telephone numbers ("TNs"). As Verizon Wireless stated in its comments, Section 251(e) gives the Commission jurisdiction over numbering administration, but does not permit the Commission to use numbering as a vehicle to

⁸⁵ VMU maintained that wireless connections are different than wireline connections because wireless connections do not provide a full-time, dedicated, physical connection between the customer's premises and the central office. As such, the intermittent and shared use of wireless connections should result in a reduced contribution rate for wireless carriers. Comments by VMU at 8-9.

⁸⁶ VMU stated that wireless services are typically sold as integrated packages in which access is not separate from transport and customers do not expect to choose two different carriers for their interstate toll versus intrastate toll and local calling. Comments by VMU at 16.

⁸⁷ *Id.* at 37-42.

collect universal service contributions. Indeed, the Commission's jurisdiction over the two arenas is separate.⁸⁸

The asserted nexus between numbering and universal service is further belied by the complete lack of numbering administration benefit from the numbers-based proposal. As several commentors described, assessments based on assigned numbers, as proposed, will create no deterrent to the potential that carriers might seek to hoard numbering resources (indeed, the Commission's reporting and utilization requirements, adopted in the Numbering Resource Optimization proceeding, effectively preclude hoarding already). Thus, there is no public interest benefit from adopting this proposal, as well as no nexus to the Commission's authority under Section 251(e).⁸⁹

Further, Section 251(e) does not allow the encroachment on intrastate revenues inherent in the TN-based proposal before the Commission. A flat rate TN-based proposal sweeps in all calls made (and service revenues collected) by customers without regard for whether the customer made interstate calls or intrastate calls using the particular TN. The per TN approach (Proposal 3), like the per wireless handset approach (Proposal 1), is both over-inclusive and under-inclusive at the same time because there is no way to segregate intrastate service so that it is not assessed illegally.⁹⁰

⁸⁸ Comments by Verizon Wireless at 19-21; 47 U.S.C. § 251(e).

⁸⁹ Nor should the Commission consider the Michigan Public Service Commission's proposal to base contributions on all numbers in a carrier's inventory. This would be inequitable and discriminatory as carriers' contribution levels would be determined largely by the historical accident of their numbering inventory size. *See* Comments by the Michigan Public Service Commission at 4-5.

⁹⁰ Even if the flat fee amount were able to be set at such a level so as to approximate the portion of interstate calls made with a given TN, such analysis would require a revenue-based analysis. Such contortions are not necessary if at the end, the real driver of the USF contribution becomes a revenue-based analysis.

The Staff Study demonstrates that the TN-based proposal measures the number of assigned numbers attributable to different carriers and industry segments, but in no way measures the use of those numbers for interstate services, as Section 254 requires.⁹¹ In effect, carriers that are the most successful in attracting customers to use their service will pay the most in USF contributions for the TNs assigned to those customers, regardless of actual interstate calling volumes. Carriers that do not use telephone numbers to provide interstate telecommunications services or that have limited use of telephone numbers are not required to contribute to USF in any way commensurate with the level of interexchange service they provide.⁹² For example, it is not necessary for IXC's to maintain substantial inventories of telephone numbers, assigned numbers or otherwise, to provide interstate service to their customers.

The TN-based system also violates the statute by failing to require contributions from all providers of telecommunications service. Ad Hoc argues that “virtually all” providers will contribute based on numbers, capacity-based equivalents, or both.⁹³ But the statute requires contributions from *all* – not *virtually* all – telecommunications providers.

The TN-based proposal is reminiscent of proposals that carriers pay for the use of telephone numbers to fund numbering administration. Carriers argued in the *Numbering Resource Optimization* (“NRO”) docket, that despite its plenary authority under Section 251(e), the Commission did not have the authority to charge for the use of TNs.⁹⁴ In fact,

⁹¹ Staff Study at 8. NRTA/OPASTCO stated that the TN proposal would assess against TNs used for local calling. Comments by NRTA/OPASTCO at 9.

⁹² Comments by Verizon Wireless at 22; Nextel at 15.

⁹³ Comments by Ad Hoc telecommunications Users Committee at 3.

⁹⁴ See Comments filed February 14, 2001, CC Docket Nos. 99-200 & 96-98, by AT&T at 21; Cingular at 23; Focal at 6-7.

in the *NRO Second Further Notice of Proposed Rulemaking* the Commission asked for comment on whether its “authority under Section 254 enables [it] to implement a market-based number allocation system as a means of funding universal service.”⁹⁵ Verizon Wireless’s comments in that proceeding are still true today and are borne out by the Staff Study:

Moreover, as the Commission recognized, using the sale of numbers to support universal service presents “some inherent difficulties,” because it would shift the support burden “from IXC’s and wireless carriers to ILEC’s.”⁹⁶ This is fatal to the Commission’s reliance on Section 254(d). Section 254(d) requires contributions to universal service support only from telecommunications carriers “that provide[] interstate telecommunications service.” It would be contrary to the Act for universal service to be supported by the sale of numbers, because numbering resources are principally used by providers of fixed or wireless local exchange service — ILEC’s, CLEC’s, and wireless carriers — and these providers may provide only a limited amount of interstate telecommunications service, if any. Interexchange carriers, who provide the greatest proportion of interstate telecommunications service, use few or no numbering resources directly in the provision of such services. As a result, if the Commission were to shift universal service support to users of numbering resources, it would eliminate support obligations from the very carriers that the statute subjects to those obligations. While the Commission admitted that using the sale of numbers to fund universal service support would cause such a shift; it actually is countermanded by the plain language of Section 254. Given that numbering resource usage has an *inverse* relationship with a carrier’s likelihood of providing interstate service, this scheme is facially contrary to the statute.⁹⁷

When examining numbering issues in the *NRO* proceeding governed by Section 251(e), the FCC looked to Section 254(d) as a source of authority to require carriers to pay for their use of TNs. Now, in the context of a universal service proceeding governed by Section 254(d), the FCC is looking to Section 251(e) as a source of authority to require

⁹⁵ *Numbering Resource Optimization, Second Report and Order, Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200, and Second Further Notice of Proposed Rulemaking in CC Docket No. 99-200*, 16 FCC Rcd. 306 (2000) at ¶ 159 (“*NRO Second Further Notice*”).

⁹⁶ *NRO Second Further Notice* at n.371.

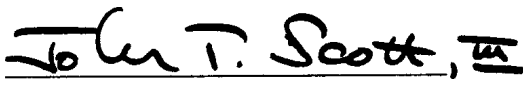
carriers to contribute to the USF on a per TN basis. The FCC apparently did not believe that Section 251(e) provided it sufficient authority to require carrier to pay the costs of federal numbering administration on a per TN basis – which casts even more doubt on the FCC’s position that Section 251(e) is sufficient authority to support a non-numbering administration function such as USF. Neither Section 251(e) nor Section 254 gives the FCC authority to effectively charge carriers for using TNs, whether to fund NANP administration or USF.

IV. CONCLUSION

For the foregoing reasons, Verizon Wireless urges the Commission to retain the revenue-based system. None of the existing proposals of this *Second Further Notice* fulfill the statute’s requirements.

Respectfully submitted,

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⁹⁷ Verizon Wireless hereby incorporates, by reference, its comments in the *NRO Second Further Notice* proceeding. See Comments filed February 14, 2001, CC Docket Nos. 99-200 & 96-98, by Verizon Wireless.

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April 18, 2003

Certificate of Service

I hereby certify that on this 18th day of April copies of the foregoing “Verizon Wireless Reply Comments on Second Further Notice of Proposed Rulemaking and Comments on USF Staff Study” in CC Docket 96-45 were sent by US Mail to the following parties:

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A handwritten signature in black ink, reading "Sarah E. Weisman". The signature is written in a cursive style and is underlined.

Sarah E. Weisman